

Central Intelligence Agency



Washington, D.C. 20505

Mr. James M. Frey
Assistant Director for Legislative
Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

I write to convey to you the Agency's comments on draft legislation prepared by the Department of Defense which would amend Section 304 of Title 5 of the United States Code so as to grant federal agencies the power to issue subpoenas in administrative hearings to terminate an individual's security clearance. The legislation was sent to us by your office for comment in February 1985, and the Agency's comments were provided informally to your office shortly thereafter. As we understand the Department may now be preparing to redraft and resubmit this legislation, we wish to make our views a matter of record for your use and that of the Department's in this matter.

The proposal does not, on its face, appear to envision or authorize the issuance of subpoenas directed against other (i.e., third party) federal agencies to compel production of their records or testimony of their employees, etc. Such an interpretation is, however, possible under the current wording of the proposal. We are not certain this result was intended yet such a result would present problems in the instance where an effort was made to direct a subpoena against the Agency with respect to certain sensitive national security matters.

We believe, however, that this concern can be easily remedied by the addition of the following phrase at the end of Section 2 of the proposal:

Provided that no subpoena may
issue to any agency, to any of an
agency's employees, for any
records of an agency or to any
person with whom an agency has a
secrecy agreement without the
consent of the head of the agency.

This language would, in effect, allow the "third agency" head to decide on the extent and manner of compliance with the subpoena. In so doing, the language would create a system paralleling the system established in the wake of the Supreme Court's decision in the Touhy case which in effect allows for a decision by an agency head on compliance with subpoenas issued to federal officers, employees and agencies (e.g., 28 C.F.R. §§16.21-16.25 - Department of Justice regulations).

With the addition of the above amendment, the Agency would have no objection to the Department's proposal.

Sincerely,

Deputy Director for Legislation
Office of Congressional Affairs

cc: Ted Hess
Department of Defense